Filed 4/13/10 In re E.S. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re E.S., a Person Coming Under the Juvenile Court Law.	
DEBRA C., Petitioner and Respondent, v. EDDIE S., Objector and Appellant.	G042566 (Super. Ct. No. AD77353) O P I N I O N
In re EDDIE S. on Habeas Corpus.	G043129

Appeal and petition for a writ of habeas corpus following from a judgment of the Superior Court of Orange County, Renee E. Wilson, Judge. Judgment affirmed. Petition denied.

Matthew I. Thue, under appointment by the Court of Appeal, for Objector and Appellant.

No appearance by Petitioner and Respondent.

No appearance by the minor.

Eddie S. appeals from a judgment terminating his parental rights to his minor son E.S., born in 1996, under Family Code sections 7822 and 7825. (All further statutory references are to this code unless otherwise stated.) He contends his son's legal guardian did not indicate an interest in adopting him, so as to qualify under section 7822, and that substantial evidence did not support findings required under the statutes. We disagree. There is evidence of a desire to adopt and, moreover, section 7822 does not require adoption. Because we affirm the termination of parental rights under section 7822, we do not decide whether it was also justified under section 7825.

Appellant also asserts the court violated the Indian Child Welfare Act (25 U.S.C. § 1912 (a)) and California Rules of Court, rule 5.481 (a) in failing to inquire as to whether his son may be an Indian child. He filed a petition for writ of habeas corpus raising this same issue. We consolidated these two proceedings. Because appellant failed to make an adequate showing of Indian ancestry, we deny the petition and affirm the judgment.

FACTS

In 2004, appellant was awarded sole legal and physical custody of his son pursuant to a default dissolution judgment issued by the San Bernardino Superior Court. In November 2006, he left the child with his wife's sister, D.C. About a month later, he gave D.C. two writings stating his intention that she have authority to make medical decisions on behalf of his son and consenting that she be his son's guardian. He stated that his "[c]onsent pertains to any living needs including, but not limited to, housing, school, medical, and financial." In January 2009, D.C. was appointed the child's

guardian. Since that time appellant has had no contact with the child and failed to provide financial support.

Earlier that year, appellant was charged with two counts of rape by force or fear (Pen. Code § 261, subd. (a)(2)) and six counts of lewd conduct against a child (Pen. Code § 288, subd. (c)(1)). Appellant was subsequently convicted under Penal Code section 288, subdivision (c)(1), based on his sexual abuse of one of his daughters.

D.C. filed a petition to declare appellant's son free from parental control. When the matter was heard, appellant was in custody and waived his appearance. Following the hearing, the court issued judgment declaring the child free from parental custody and control. The judgment included the following findings: "4. There is clear and convincing evidence that the minor child . . . should be declared free from the custody and control of his father, . . ., pursuant to Family Code [section] 7822 in that . . . father left the . . . minor child in the care and custody of [p]etitioner for a period of over one year without provisions for [the] minor child's support with the intent to abandon [the] minor child. [¶]5. Additionally [t]here is clear and convincing evidence that the minor child . . . should be declared free from the custody and control of his father . . . pursuant to Family Code [section] 7825, in that . . . father was convicted of a felony, specifically [Penal Code, section] 288 [subdivision] (c)(1), the crime of which is of such a nature to prove the unfitness of the father to have future custody and control of the child."

DISPOSITION

1. The judgment is supported by substantial evidence of abandonment.

Section 7822, subdivision (a)(2) applies to a child who "has been left by both parents or the sole parent in the care and custody of another person for a period of

six months without any provision for the child's support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child." Subdivision (b) provides that "[t]he failure to . . . provide support or failure to communicate is presumptive evidence of the intent to abandon." Here almost three years had passed by the time the matter was heard, during which appellant had neither supported nor communicated with his son.

For a substantial portion of this time appellant was incarcerated. Appellant states in his brief that conditions of his parole prevented him from having physical contact with his son. The latter statement is not supported by the record and there is no claim that appellant was prohibited from communicating with his son during his incarceration. The failure to communicate, standing alone, qualifies appellant's son under section 7822, subdivision (a)(2). Furthermore, conditions of parole would not apply until appellant was granted parole; his failure to communicate with his son during his incarceration is unexplained. "The parent need not intend to abandon the child permanently; rather, it is sufficient that the parent had the intent to abandon the child during the statutory period. [Citation.]" (*In re Amy A.* (2005) 132 Cal.App.4th 63, 68, fn. omitted.)

Appellant also contends he did not "leave" his son, citing cases where court orders required the child be placed with another parent or grandparents. (*In re Jacklyn F.* (2003) 114 Cal.App.4th 747, 756; *In re Cattalini* (1946) 72 Cal.App.2d 662, 663.) But here there was no court order. And again there is no explanation for appellant's failure to support or communicate with his son.

As to appellant's argument that he did not intend to abandon his son, we note the statutory presumption of intent to abandon (§ 7822, subd. (b)) and the absence of any evidence presented to the court to contradict this presumption.

2. We need not decide whether section 7825 also supports the judgment.

The court also based its judgment on section 7825, which permits termination of parental rights if "(1) The child is one whose parent or parents are convicted of a felony. [And] (2) The facts of the crime of which the parent or parents were convicted are of such a nature so as to prove the unfitness of the parent or parents to have the future custody and control of the child." Because the judgment is supported under section 7822, we need not discuss appellant's contention that there was no substantial evidence that his conviction under Penal Code § 288, subdivision (c)(1) also rendered him unfit to parent his son.

3. Adoption is not a condition for the termination of parental rights.

Appellant also contends that termination of his parental rights was improper because there is no evidence that D.C. intended to adopt his son. As appellant notes, section 7800 states as a purpose of the statute creating the procedures for termination of parental rights, the desirability of "the stability and security of an adoptive home." But nothing in the statutory scheme provides that this is a condition that must be established before parental rights may be terminated, and appellant cites no authority for such a proposition. Furthermore the record contains an Adoption Request, filed by D.C. on March 3, 2009. The record does not disclose what transpired in this regard after the request was filed but presumably the adoption proceeding is pending until our decision on this appeal becomes final.

4. Appellant failed to make an adequate showing of Indian ancestry.

Both the Indian Child Welfare Act (25 U.S.C. § 1912 (a)) and California Rules of Court, rule 5.481 (a) required the court to inquire as to whether appellant's son

may be an Indian child. There is no record to indicate that this was done. We previously held that, absent a factual showing of Indian ancestry, any error relating to a failure to make the required inquiry is harmless. (*In re. N.E.* (2008) 160 Cal.App.4th 766, 771.) We therefore examined appellant's declaration filed as an exhibit to his petition for habeas corpus to determine if it contained an adequate factual showing of Indian ancestry and found it wanting.

The relevant portions of the declaration state "1. I have reason to believe I have Cherokee Indian ancestry. [¶] . . . [¶] 3. During these proceedings neither [D.C.], nor the court, ever asked me whether I or my son have Indian ancestry. [¶] 4. Had I been asked, I would have truthfully informed [D.C.] and the court about my Cherokee ancestry." The declaration fails to provide any foundation for appellant's belief. If it were sincere, it would have been simple for appellant to specify the factual basis for it.

In addition, the failure of the court to inquire as to Indian ancestry status may be explained from the record. It contains a report from the Los Angeles County Department of Children and Family Services prepared in connection with a dependency status review hearing scheduled for October 10, 2006. (The children were declared dependents of the Court in November 2005.) The report covers several children, including appellant's son who is the subject of these proceedings, and notes, "The Indian Child Welfare Act does not apply."

We therefore deny the petition for habeas corpus and affirm the judgment terminating appellant's parental rights.

DISPOSITION

The judgment is affirmed. The petition for habeas corpus is denied.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

FYBEL, J.